79-424

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DOCKET NO.

In the Matter of the Application

of

THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT D. STONE
Deputy Commissioner for
Legal Affairs
Attorney for Petitioners
Office and Post Office
State Education Building
Albany, New York 12234
(518) 474-6150

Jean M. Coon
Donald O. Meserve
Of Counsel

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TO THE HONORABLES, THE PRESIDING JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners above named respectfully pray that a writ of certiorari issue in the

above-captioned case, directed to the United States Circuit Court of Appeals for the Second Circuit to review its judgment dated June 19, 1979 and entered in the Office of the Clerk of that Court on June 19, 1979.

OPINIONS BELOW.

The opinions in the Courts below are:

1. Majority and minority decisions respectively of Circuit Judge Oakes and District Judge Brieant and of Judge Lumbard of the United States Court of Appeals for the Second Circuit, ____ F 2d _____ (Appendix "A").

2. Decision of Judge Foley of the United States District Court for the Northern District of New York, not reported (Appendix "B").

3. Decision of the New York State Court of Appeals, 38 NY 2d 724, 343 N.E. 2d 755, 381 N.Y.S. 2d 37 (Appendix "C").

4. Decision of the Appellate Division of the Supreme Court of the State of New York, Third Department 43 AD 2d 643, 349 N.Y.S. 2d 806 (Appendix "D").

Note. No written decision was issued by the Supreme Court of the State of New York, which entered judgment for Mary Tomanio, and which was reversed by unanimous decision of the Appellate Division and of the New York State Court of Appeals.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Second Circuit June 19, 1979. There was no application for a rehearing and no order has been issued extending the time within which to petition for certiorari.

The statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254 subdivision (1).

QUESTIONS PRESENTED

1. Has the Court of Appeals for the Second Circuit decided an important question of Constitutional Law erroneously, which question has not been decided by this Court?

2. Has the Court of Appeals for the Second Circuit interpreted a New York State statute in a manner contrary to the interpretation of the same statute, on the same facts, by the highest Court of the State of New York, and has said Court of Appeals violated accepted principles of Federal-State comity?

3. Should this Court, in its supervisory capacity, review the interpretation of the doctrines of "res judicata" and the statute of limitations by the Circuit Court of Appeals for the Second Circuit which interpretation promotes unnecessary litigation and unduly prolongs it and which conflicts with the interpretation in the First Circuit?

CONSTITUTIONAL PROVISIONS INVOLVED

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Former New York Education Law section 6556 providing for the licensure of chiropractors already in practice when the licensing statute became effective;

New York Education Law section 6551 subdivision 1 defining chiropractic;

New York Education Law section 6506 authorizing the Board of Regents to waive specific licensing requirements in any profession or to indorse licenses of other jurisdictions;

42 U.S. Code U.S.C. section 1983, Civil Rights Statute

STATEMENT OF CASE

The initial chiropractic licensing statute was enacted in New York as Chapter 781 of the Laws of 1963, effective July 1, 1963. The statute, as amended and administered, set forth general licensing requirements and an alternative method of qualification for current practitioners which gave them six chances to pass a special examination designed to test the understanding of fundamental concepts and take into account the applicant's experience in actual practice (former New York Education Law section 6556, set forth in Appendix F at pp. F1-F4). Respondent took the special examination six times and failed it. Respondent then took the regular licensince examination, and failed it. The marks on these seven examinations appear as Appendix G. She remains eligible to take and pass the regular licensing examination.

After failing to meet the requirements of the chiropractic licensing statute, respondent applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, authorizing the waiver of specific licensing requirements "provided the board of regents shall be satisfied that the requirements...have been substantially met" (Education Law section 6506 subdivision 5) (App. F pp. F5-F6). That application was based upon respondent's assertions that she had almost passed the examination, that she was licensed in two other states (Maine and New Hampshire) and that she had passed an examination given by the National Board of

Chiropractic Examiners, a private organization without official status. The application for a waiver of the licensing examination was denied and respondent was so notified by a letter dated November 22, 1971. The denial was based upon the conclusions that almost passing an examination is not the substantial equivalent of passing it, that the licensure requirements in Maine and New Hampshire were not substantially equivalent to those in New York, and that the National Board Examination was not substantially equivalent to the examination required by the New York statutes.

Respondent litigated the merits of the determination in the New York courts, which sustained the denial of her application. The decisions are Appendixes C and D hereto.

In June 1976, over four and one half years after the determination, and seven months after the final judgment of the New York State Court of Appeals, respondent commenced this action in United States District Court for the Northern District of New York, contending that the refusal of petitioners to issue a license to practice chiropractic in the State of New York was a violation of her constitutional rights. The relief requested was an adjudication that the denial of her application for waiver of the licensing requirement, after she had failed the examination, was a violation of her constitutional rights, and an injunction permitting her to practice chiropractic in New York State. Petitioners answered and moved for summary judgment dismissing the complaint.

Respondent alleged Federal jurisdiction under the 14th and 5th Amendments, 28 U.S.C. sections 1331, 1343, 2201, and 2202 and 42 U.S.C. section 1983. The decisions of the Courts below apparently sustained jurisdiction under the 14th Amendment, 28 U.S.C. section 1331 and 42 U.S.C. section 1983.

The District Court awarded judgment in favor of the respondent, declaring that the failure of petitioners to offer her a hearing on her application for a waiver of the examination requirement was a denial of due process, even though no hearing was required by statute or regulation and none had been requested by respondent. The Court refused to order the issuance of a license or to grant any injunctive relief. The Court also rejected the defense that the action was time-barred and the defense of res judicata.

Petitioners appealed from so much of the judgment as dismissed the defenses of the statute of limitations and of res judicata and declared that petitioners had violated respondent's constitutional rights.

No cross appeal was filed by respondent.

The Circuit Court of Appeals for the Second Circuit affirmed, with Circuit Judge Lumbard dissenting. (Appendix A)

REASONS FOR GRANTING CERTIORARI

The Court should grant the motion for certiorari, pursuant to Rule 19, for the following reasons.

1. The Court of Appeals for the Second Circuit has decided an important question of Constitutional Law erroneously, and the question has not been decided by this Court.

2. The Court of Appeals for the Second Circuit has interpreted a New York State statute (Education Law section 6506) in a manner contrary to the interpretation of the same statute, on the same facts, by the highest court of the State of New York, and has violated accepted principles of Federal-State comity.

3. This Court, in its supervisory capacity, should review the interpretation of the doctrines of "res judicata" and the statute of limitations by the Circuit Court of Appeals for the Second Circuit in a manner which promotes unnecessary litigation and unduly prolongs it and which conflicts with the interpretation in the First Circuit.

Before addressing these three points, we want to emphasize the importance of this case, This is not merely a question of the right to continue practice of one chiropractor. The Court below has erred on a

point of Constitutional Law of great importance not only to petitioners but to all licensing authorities at all levels of government. It would require either a rigid adherence to specific licensure requirements, with no discretion to waive specific requirements in meritorious cases, (where the substance but not the letter of the requirement has been met); or else the licensing authority would be required to conduct a "due process" hearing whenever a candidate who was unable to meet a specific requirement asked for a waiver of it. This would deprive licensing authorities of the discretion to deal with special circumstances, or, if they wish to retain that discretion, would require the conduct of hundreds of "due process" hearings in factual situations which did not warrant them, as will appear more fully from the discussion of the facts of this case.

1. THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ERRONEOUSLY, AND THE QUESTION HAS NOT BEEN DECIDED BY THIS COURT.

The majority of the Court below has seriously misconstrued the Fourteenth Amendment and the effect of the decision of this Court in Board of Regents v. Roth (408 U.S. 564). It has carried its conception of "due process" too far, by holding that respondent should have been given a hearing before an impartial hearing officer on her application for waiver of an examination requirement after she had failed seven examinations. It has done so notwithstanding the following facts:

1. The determination denying respondent's application was made in 1971, prior to the decision in Roth.

2. No hearing was requested and respondent was represented by counsel at all stages of the administrative proceeding and in the State Court proceedings.

3. There are no disputed facts and the record is utterly devoid of any suggestion of any additional evidence which could be presented at a hearing.

Respondent's initial application for licensure was under the chiropractic licensing statute (Appendix F p. F1-F4). The constitutionality of these requirements for chiropractors to continue to practice in New York was litigated and sustained (Wasmuth v. Allen, 14 NY 2d 391, app. dism. 379 U.S. 11). Respondent did not contest the content or grading of her examinations. After she had exhausted the series of six special examinations for "grandfather" applicants, she was (and is) eligible to qualify by passing the regular examination. She tried once and failed five of the nine subjects (Appendix G).

At that point in time she had been afforded due process by the examinations themselves. Even the majority of the Court below agrees that "Doubtless procedural due process requirements would be satisfied were licensure made dependent solely upon passing a fairly written examination...." We submit that such was the case, and that any previous expectation of a continuing right to practice was, at this stage, terminated by respondent's own failure to pass the required examination.

Respondent then made a new application under the provisions of Education Law section 6506, applicable to all professions, authorizing petitioners to waive a specific licensing requirement if they are satisfied that it has been substantially met (Appendix F p. F5-F6).

The purpose of this provision, its interpretation by the New York courts, and its inapplicability to respondent's factual situation are discussed in point 2 post at pp. 15-17.

The facts upon which respondent based her application for waiver of the examination were not disputed. She did not request a hearing, none was required by statute and at the time of petitioners' final determination (Nov. 22, 1971) this Court had not yet decided Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed 2d 548, 92 S. Ct. 2701; Perry v. Sinderman, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694; and Morrisey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593. Even after those decisions, respondent did not request a reopening and a hearing. The facts of this case and similar cases do not require or justify a hearing. Neither does the Fourteenth Amendment. Although this Court has not addressed this specific question, the trend of its decisions in this area of due process indicates that no hearing was required.

There is a distinction between cases in which the State or a private party moves to terminate a right to liberty or property which it has conferred, and which the holder reasonably assumes to be a continuing right, and cases, such as this one, where the right is subject to the holder meeting and maintaining standards of eligibility. The former cases involve action of a disciplinary nature, and a due process hearing is required

(Perry v. Sinderman, supra; Morrisey v. Brewer, supra; Goss v. Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729). The latter type of cases involve failure to qualify for a right or to meet the standards for its continued exercise, without any allegation of misconduct or any aura of discipline or opprobrium. In these cases no such due process hearing is required (Board of Regents v. Roth, supra; Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893; Leis v. Flynt, ___ U.S. ___ 58 L. Ed. 2d 717, 99 S. Ct. 698; Spady v. Mount Vernon Housing Authority, 34 NY 2d 573, 354 N.Y.S. 2d 945, 310 N.E. 2d 542, cert. den. 419 U.S. 983, 42 L.Ed. 2d 192, 95 S. Ct. 243).

The facts of this case place it in the latter group of cases, and the court below erroneously applied the rules of due process applicable to the former group of cases. The decision would seriously impair and unnecessarily prolong and complicate the State's exercise of its police power to protect citizens by insuring high standards of competence for professional licensees, and by using objective and fair licensing examinations to achieve that purpose.

2. THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A NEW YORK STATE STATUTE (EDUCATION LAW SECTION 6506) IN A MANNER CONTRARY TO THE INTERPRETATION OF THE SAME STATUTE, ON THE SAME FACTS, BY THE HIGHEST COURT OF THE STATE OF NEW YORK, AND HAS VIOLATED ACCEPTED PRINCIPLES OF FEDERAL-STATE COMITY.

Both the present statutory provisions and similar former statutes have been uniformly construed by petitioner and by the New York courts as applicable to extraordinary situations. They have been applied in the case of applicants from other jurisdictions and where a licensure requirement is substantially equivalent to, but does not meet the letter of the New York requirement. They have not been applied to situations where New York applicants have failed a licensure examination and have then sought to have it waived. This is undisputed and established in the record.

This interpretation has been endorsed by the New York Courts. In Matter of Erlanger (256 App. Div. 447) cited by the New York State Court of Appeals in its affirmance of the decision of the Appellate Division in favor of petitioners in this case, the Court said: "The Regents may not legally,

through the exercise of the remedial power conferred by this section, admit to the profession those who have not met the requirements the Legislature has established. If they err at all, it should be on the side of the protection of the public" (256 App. Div. at p. 447). And in this very case, on the undisputed facts, the Appellate Division noted: "Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examination and barely failed (43 AD 2d at p. 644). The Court of Appeals, New York's highest Court, unanimously affirmed that decision. Yet the Federal lower courts have totally ignored this interpretation of the key New York statute by respondents and by the New York Courts, and have substituted their view of what New York law should be for what it actually is, as Judge Lumbard noted in his dissent below. The general provision authorizing the waiver of specific licensure provisions in exceptional circumstances serves an equitable purpose. Its exercise, or the refusal to exercise it, is always subject to judicial review. It can reasonably be administered on the basis of written applications, without hearings, except as they may be required by specific factual disputes. It is not to be used as a means of avoiding specific requirements by applicants who have already demonstrated their inability

to meet them. The majority of the Court below has ignored the purpose and interpretation of the waiver statute. The result is a conflict between the majority decision of the Court below and the highest court of the State on the interpretation of this State statute, which should be resolved by this Court.

In addition to the fact that the general waiver statute does not apply to persons who have failed the New York licensing examination, the remaining grounds for waiver urged by respondent are also insufficient. New York has not accepted the pre-1972 licensing examinations given by the National Board of Chiropractic Examiners as the equivalent of the New York examination, nor has it accepted the standards for licensure in New Hampshire and Maine as the substantial equivalent of those in New York. These questions were raised in the New York court proceedings. Respondent offered no evidence to prove that the National Board examination or the out of state licenses were the substantial equivalent of passing the New York examination. The New York courts sustained petitioners determination on this point, and the defense of res judicata, even under the narrow rule in the Second Circuit, precludes further judicial review. The suggestion of the majority of the Second Circuit that the question whether or not respondent would be entitled to a waiver cannot be determined until after a hearing before an impartial hearing officer is

a further serious violation of Federal-State comity. It ignores the fact that this issue was litigated and settled in the State Courts.

Petitioners and other licensing boards have limited budgets and staff. During the 1970's eight new professions have been recognized in New York (speech pathology, audiology, occupational therapy, animal health technology, masseurs, certified social workers, physician's assistants, and specialist's assistants). Existing practitioners are required to meet specific licensing requirements to continue to practice. The decision of the court below would enable each of the hundreds of applicants in these and other groups licensed in the future to apply for a waiver of any requirements they cannot meet, and would require petitioners to conduct due process hearings on such applications regardless of any request for a hearing, and regardless of the existence of any real likelihood of success or factual issue to be determined. This would be a massive waste by the Federal courts of the resources of petitioner and other State and local licensing agencies, and it is not mandated by the Fourteenth Amendment as heretofore interpreted by this Court.

3. THIS COURT, IN ITS SUPERVISORY CAPACITY, SHOULD REVIEW THE INTERPRETATION OF THE DOCTRINE OF "RES JUDICATA" AND THE STATUTE OF LIMITATIONS BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN A MANNER WHICH PROMOTES UNNECESSARY LITIGATION AND UNDULY PROLONGS IT AND WHICH CONFLICTS WITH THE INTERPRETATION IN THE FIRST CIRCUIT.

The refusal of the Second Circuit to apply the statute of limitations or to apply the defense of "res judicata" in this and similar cases promotes unnecessary litigation and unreasonably prolongs it, and should be corrected by this Court.

The Second Circuit tolled the statute of limitations during the pendency of the State court litigation by respondent, citing its own prior decision in Lombard v. Board of Education (502 F 2d 631). At the same time the Second Circuit refused to apply the defense of "res judicata", because the respondent's allegations of a deprivation of her civil rights were not raised in the State courts, even though she was represented by an attorney at all stages of the State Court proceedings, and during prior administrative proceedings. The Second Circuit cited its own prior decisions in Ornstein v. Regan (574 F 2d 115) and Winters v. Lavine (574 F 2d 46) in support of this holding. The effect of these two rules, as the Second Circuit

itself admits, "allows a civil rights plaintiff to split his cause of action, litigate state claims in the State court, lose, and then start all over again in Federal court, asserting his constitutional or Federal civil rights claims arising out of the same facts" (Appendix A, note 1).

Although the Second Circuit cites "advancing the goals of federalism" as a justification of those rules, their practical effect, as well demonstrated by this case, is to enable the lower federal Courts to expand their jurisdiction, and review decisions of the highest State courts, and to enable litigants to unreasonably prolong litigation by successfully litigating the same case in first the State and then the Federal courts. These rules are apparently different in the First Circuit, which has stated that (in the absence of a tolling statute), "prior actions in the state courts do not toll the applicable statute of limitations" so as to extend the time within which a Civil Rights action may be commenced (Ramirez de Arellano v. Alvarez de Choudens, 575 F 2d 315 [1st Cir. 1978].

The Second Circuit's narrow interpretation of "res judicata" is contrary to the general interpretations of the rule, which would sustain the defense raised in the prior case (Preiser v. Rodriquez, 411 U.S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827).

The adoption of the rule of the First Circuit, requiring litigants to raise Federal questions within the time permitted by reasonable statutes of limitations, and the adoption of the traditional interpretation of "res judicata" as applicable to issues which could have been raised, particularly in cases in which a litigant has been represented by an attorney, would help relieve the burden on the Federal courts, would eliminate unnecessary litigation, and would lead to the speedier resolution of important legal questions.

This Court should exercise its supervisory responsibility to resolve the conflict between the First and Second Circuits on the tolling of statutes of limitations, and should review the narrow interpretation of the rule of "res judicata" in the Second Circuit.

CONCLUSION

Wherefore, petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: September 11, 1979

Respectfully submitted,

ROBERT D. STONE
Deputy Commissioner
for Legal Affairs
Attorney for Petitioners

By Jean M. Coon

Donald O. Meserve
of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 798—August Term, 1978.

(Argued March 20, 1979 Decided June 19, 1979.)

Docket No. 78-7637

MARY TOMANIO,

Plaintiff-Appellee,

—against—

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants-Appellants.

Before:

OAKES and LUMBARD, *Circuit Judges,* and
BRIEANT, *District Judge.**

Appeal from summary judgment granted by Chief Judge Foley of the United States District Court for the Northern District of New York declaring that appellee's civil rights were violated by failure to grant a hearing prior to denying a waiver, under New York Education Law § 6506(5), of examination requirements for a license to continue the practice of chiropractic.

Affirmed.

DONALD O. MESERVE, Esq., Albany, New York (Jean M. Coon, Assistant Attorney General, State of New York, of counsel) *for Defendants-Appellants.*

VINCENT J. MUTARI, Esq., Garden City, New York, *for Plaintiff-Appellee.*

BRIEANT, *District Judge:*

Appellants (hereinafter "the Board of Regents" or "the Regents") seek to review a final judgment of the United States District Court for the Northern District of New York, James T. Foley, Chief Judge, which declared the Regents had violated plaintiff-appellee's civil rights. The Regents urge that the district court erred in holding that under the circumstances detailed below, appellee was entitled to an impartial hearing and statement of reasons for denial of her application for a waiver of state professional licensing requirements, as authorized by New York Education Law, § 6506(5). The Regents also claim the action should have been dismissed as *res judicata* by reason of a state court judgment, and that it was time barred. Finding no merit in any of these contentions, we affirm.

Effective July 1, 1963, the profession of chiropractic came under licensure by the Regents as a result of Chap-

* Honorable Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

ter 780, *et seq.* of the New York Laws of 1963, now codified as amended in §§ 6552, *et seq.* of Title 8 of the New York Education Law. Current practitioners of chiropractic on that date were permitted to qualify under the less stringent provisions of former § 6556 of the New York Education Law. This "grandfather" provision, as it was characterized below, required passing an examination in the practice of chiropractic, and if the applicant wished to use X-ray, a further examination in its use and effect. As to current practitioners, § 6506(5) authorized waiver of "education, experience and examination requirements for a professional license . . . provided the Board of Regents shall be satisfied that the requirements of such Article have been substantially met."

Plaintiff-appellee took the special examinations intended for current practitioners and passed all subjects except chemistry and X-ray. Chemistry was mandatory, although, as noted above, a limited license excluding use of X-ray can be obtained without a passing mark in that field. Computing her test scores in the manner permitted by the New York State Education Department's regulation on grade averaging [8 N.Y.C.R.R. § 73.3] appellee's failure in the science part of the examination which includes chemistry was measured by a margin of six tenths of one percent. She received passing scores in all other subjects.

Appellee, 58 years old at the time of her hearing in the district court, was licensed to practice her profession in Maine and New Hampshire, and has also passed an examination given by the National Board of Chiropractors. On September 21, 1971, she applied for a waiver under § 6506(5) quoted above. This application was denied November 19, 1971 without a hearing, and without any statement of reasons.

As to whether the federal claim is time barred, we conclude the district court did not abuse its discretion in determining that the statute of limitations was tolled for a period commencing January 26, 1972, when appellee filed a timely proceeding in the New York State Supreme Court pursuant to Article 78 of the New York CPLR to set aside the denial of waiver by the Regents as arbitrary and capricious and order issuance of a license to practice chiropractic. That petition, which pleaded no federal constitutional claims, was granted at Special Term of the New York Supreme Court, but the order was later reversed on appeal. It was not until November 20, 1975 that the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court holding that as a matter of state law the Board of Regents had not abused its discretion in denying the waiver. *Tomanio v. Board of Regents*, 38 N.Y.2d 724 (1975), *aff'g. mem.* 43 App.Div.2d 643 (3rd Dept. 1973). Appellee was diligent in pressing her claims. Her state litigation was initially successful. It was not until after the three year statute of limitations had expired that the state litigation was finally resolved against appellee. She filed this action on June 25, 1976, some seven months later. This Court has recognized the propriety, under such circumstances, of tolling the statute in the interests of advancing the goals of federalism. *Williams v. Walsh*, 558 F.2d 667, 674 (2d Cir. 1977); *Ornstein v. Regan*, 574 F.2d 115, 119 (2d Cir. 1978).

As the federal constitutional claim was not raised or litigated in the state proceeding, it was not barred in the federal court by the doctrine of *res judicata*.[1] *Ornstein v.*

1 Nor are we, as the dissent suggests, second guessing twelve New York appellate judges, which, were it so, would indeed be "offensive to accepted principles of federal-state comity, common

Regan, supra at 117; *Winters v. Lavine*, 574 F.2d 46 at 56-58 (2d Cir. 1978) and cases therein cited.

By its plain meaning, the waiver provision of New York State Education Law § 6506(5) is applicable to appellee's factual situation. That this is true was implicitly conceded in the opinions in appellee's state court proceedings cited above. This being so, before such a waiver could be denied to one already practicing her profession, appellee was and is, under the circumstances of this case, entitled to an adjudicative hearing before the Board of Regents, or its duly designated impartial hearing officer, and if waiver be denied, is also entitled to a statement of reasons for the denial.

Doubtless procedural due process requirements would be satisfied were licensure made dependent solely on passing a fairly written examination reasonably related to the required skills, with those who flunk cast out of their profession. In this case, those who flunk may be admitted nonetheless by waiver, the granting or withholding of which is entrusted to the Regents on statutory criteria as broad and vague as that found in *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). Where, as here, such broad discretionary power is granted to admit or deny entrance or continuance in a learned profession, it "must be construed to mean the exercise of a discretion to be exercised after fair investigation with such notice, hearing and opportunity to answer for the applicant as would constitute due process." *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (per Ch. Justice Taft, 1926).

sense and judicial modesty." The rule of this Court, stated in *Lombard v. Board of Education*, 502 F.2d 631, 635 (2d Cir. 1974) allows a civil rights plaintiff to split his cause of action, litigate state claims in the state court, lose, and then start all over again in federal court, asserting his constitutional or federal civil rights claims arising out of the same facts. Because, as in *Lombard*, appellee did not raise her federal constitutional rights in the state courts, none of the twelve New York judges passed on them.

The adjudicative fact to be determined in considering whether to grant a waiver is not whether Dr. Tomanio may practice her profession in New York, as she can do in Maine and New Hampshire, as a matter of grace from her sovereign or at the whim of the Regents. Rather, it is whether, notwithstanding her narrow failure of the examination, she "substantially" meets licensure requirements. Of course the state legislature need not have provided for any waiver of the examination. But once it did so, denial of the waiver implicates procedural due process rights. An adjudicative fact of such significance to appellee's interests cannot, in logic or constitutionally, be resolved without a hearing before an impartial fact finder, followed by a statement of reasons in the event of denial. This is so because the interest of a current practitioner of the healing arts in the continued practice of her profession is a property right within Fourteenth Amendment protection as defined in *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), and may also be "liberty" within the same provision. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See also, *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978) and Friendly, "Some Kind of Hearing" 123 U.Pa.L.Rev. 1267, 1296-97 (1975). The judgment appealed from merely declares such right. Whether, following an impartial hearing, appellee would be entitled to a waiver was not determined below, nor could it be in the absence of such hearing.[2]

2 The dissent notes that "plaintiff does not suggest any reason why the Board would or should grant a waiver." A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court and dismiss the complaint.

Plaintiff brought this action in the United States District Court for the Northern District of New York, contending that defendants' refusal to issue a license to practice chiropractic in the State of New York deprived her of property without due process in violation of the Fourteenth Amendment. She requested an injunction directing that she be permitted to practice chiropractic in New York. Defendant answered and moved for summary judgment dismissing the complaint.

The district court awarded judgment for the plaintiff, declaring that defendant's failure to provide a hearing on plaintiff's application for a waiver of the examination requirement deprived her of her livelihood without due process. The court did not grant any affirmative relief, but issued a declaratory judgment stating that the plaintiff's due process rights had been violated and that she was entitled to an administrative hearing. Defendants appealed.

New York's chiropractic licensing statute was enacted as Chapter 781 of the Laws of 1963, to take effect July 1, 1963. Plaintiff had been practicing chiropractic since 1958. The statute provides general licensing requirements for new applicants, including, inter alia, examination requirements. The statute also includes a generous "grandfather" provision, allowing an alternative method of qualifying for persons already practicing chiropractic on the effective date of the statute. Plaintiff has taken the examinations under the less rigorous provisions of the grandfather clause on six occasions, the last time in 1971, but has never achieved a total accumlated score sufficient to pass even under this lesser standard. Plaintiff has also

taken and failed the regular licensing examination. She nevertheless remains eligible to take and pass the regular licensing examination.

After failing to pass the required examination on her seventh attempt, plaintiff applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, allowing the Board of Regents, in its discretion, to waive specific requirements for licensing "provided the Board of Regents shall be satisfied that the requirements . . . have been substantially met." Education Law Section 6506, subdivision 5. This statute makes no provision for a hearing on an application for a waiver. The Board of Regents, after considering plaintiff's request for a waiver, denied her application.

Plaintiff then brought a proceeding in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking to compel the Board of Regents to waive the examination requirement in her case and to issue her a license. Supreme Court, Albany County, entered judgment for plaintiff, without opinion. The Appellate Division, Third Department, reversed in a unanimous opinion, on the ground that the authority to give a waiver is "permissive, not mandatory":

> "A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious . . . had the board waived the requirements on record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against countless numbers who

have taken this State's licensing examinations and barely failed." 43 App. Div. 2d 643 (1973).

The Court of Appeals affirmed the Appellate Division in a second unanimous opinion, on the ground that "the refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion." 38 N.Y. 2d 724 (1975). Plaintiff then brought suit in federal court and obtained the declaratory judgment on appeal here.

The Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law." Courts have construed this clause to mean that when the state takes a person's property, it must adhere to recognized principles of substantive and procedural law. Thus when any significant property interest, such as a person's entitlement to earn a living as a chiropractor, is taken, that person is entitled to a hearing and a right to be heard. The type of hearing that is required in a particular situation depends on all the circumstances. I would hold with the New York Court of Appeals that in the context of professional licensing, a regularly and fairly administered examination procedure satisfies plaintiff's due process right to be heard. Here the plaintiff does not challenge the fairness of the examination itself, the way in which it was given, or the way in which it was graded.

I do not believe that due process requires, in addition to a fair examination, a special hearing to determine whether the examination should be waived for applicants who have failed it. Where a law or regulation, such as the regulation setting up minimum passing grades here, has been validly promulgated for a legitimate public purpose and the complainant admittedly falls within the am-

bit of that regulation, enforcement without exceptions does not violate due process.

Even after taking account of the importance of plaintiff's property interest, the public interest in an objective and impartial method for certifying chiropractors fully justifies exclusive reliance on an examination procedure such as New York provides. Although we may sympathize with the plight of those who fail qualifying professional examinations, those examinations are required for a reasonable and valid public purpose: to determine who is qualified to practice a particular profession. In this case, the qualifying examination which the appellant has repeatedly failed is the principal means for protecting a public which cannot by itself adequately verify the credentials of those chiropractors they turn to in time of need.

That the State of New York has gone beyond the requirements of due process, as fulfilled by a fair examination, and has provided for the possibility of a waiver in the discretion of the Board of Regents, should not change the result. The addition of a waiver procedure which is not required by due process does not require a further hearing where a further hearing would not otherwise be required. Plaintiff, moreover, has not shown any unfairness either in the processing of the examination or in the decision to deny her a waiver. Plaintiff does not suggest any reason why the Board would or should grant a waiver. In short, she has not been deprived of any right by reason of not being allowed to appear before the Board.

Plaintiff might have made out a case on her right to receive a waiver, or at least on her right to a hearing before one was denied, had she shown that the state had granted waivers to others who had failed the examination

and that there were no discernible standards for distinguishing her from those who had received the waivers. But plaintiff has made no such showing. In fact, she has not shown us one case where anyone who has failed the examination has been given a waiver relieving them of the consequences. Indeed, although the waiver provision theoretically includes waivers for failure to pass the examination, it is more clearly aimed at waiver of requirements less directly related to competency, such as residence or citizenship. Accordingly, that the letter of the law was applied to appellee as the legislature contemplated does not make out arbitrary and capricous action amounting to a violation of due process.

Finally, in the absence of a violation of due process (such as does not exist here), I do not think that the federal courts should interfere with state licensing procedures—especially to require the state to hold a hearing in a case where no good reason is shown for holding one.

If we were to affirm the district court's notion that the plaintiff is entitled to a hearing, we would be suggesting resort to the federal courts whenever a state agency fails to license someone who fails to qualify. We would not only interfere with what is exclusively a state function, we would also encourage frivolous and needless litigation.

If New York opts for strict observance of its licensing laws it is not the proper business of the federal courts to decide how, if at all, strict observance should be tempered by a waiver procedure, so long as the administration of the state system does not offend equal protection. For one, two or even three federal judges to second-guess twelve New York appellate judges on a question of this nature is offensive to accepted principles of federal-state comity as well as to common sense and judicial modesty.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against- 76-CV-263

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants.

APPEARANCES: OF COUNSEL:

VINCENT J. MUTARI
Attorney for Plaintiff
600 Old Country Road
Garden City, New York 11530

ROBERT D. STONE DONALD O. MESERVE
Attorney for Defendants
State Education Department
Education Building
Albany, New York 12224

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff Mary Tomanio commenced this action premised on the Fourteenth Amendment and 42 U.S.C. § 1983 on June 25, 1976, invoking the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1343. The ultimate relief that plaintiff seeks is an order directing the defendants Board of Regents of

the State of New York and Ewald B. Nyquist, then Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, to waive examination requirements and issue her a license to practice chiropractic in the State of New York.

Presently before the Court is plaintiff's motion for a preliminary injunction permitting plaintiff to practice her chosen profession in the State of New York and enjoining the County Court of Dutchess County, New York, from proceeding with a pending criminal prosecution for the practice of chiropractic without a license until such time that this Court rules on the merits of plaintiff's complaint. Also before the Court is defendants' motion for summary judgment in their favor on the grounds of, inter alia, res judicata, failure to state a claim upon which relief can be granted, and statute of limitations.

FACTUAL BACKGROUND

Plaintiff has been practicing chiropractic in this state since 1958. In 1963, at the behest of chiropractors, New York State enacted a licensing scheme for the practice of chiropractic. See N.Y. Times, April 30, 1963, at 37, col. 1.

On seven separate occasions between 1964 and 1971 plaintiff attempted to satisfy the chiropractic licensing examination requirement pursuant to a "grandfather" provision applicable to those, like plaintiff, who were then practicing in New York State.

See Ch. 780, §1 [1963] N.Y. Laws 1282-1285 (McKinney) (former N.Y. Education Law § 6556). Although plaintiff failed to achieve the necessary grades for licensing, her failure was by a very narrow margin. See Tomanio v. Board of Regents, 43 App. Div. 2d 643 (3d Dep't 1973)(mem.), aff'd mem., 38 N.Y. 2d 724 (1975). Plaintiff failed one part of the licensing examination, chemistry by 8 points. Through use of the Education Department's regulation on averaging, 8 N.Y. C.R.R. § 73.3, plaintiff's failure in the science part of the examination, which includes chemistry, was by only .6 of 1%. Plaintiff received passing scores in all other subjects. In 1972, subsequent to her inability to pass the examinations given under the "grandfather" provision of the new statute, plaintiff took the regular licensing examination for chiropractors and again failed to attain a passing score. See N.Y. Education Law § 6554(4) (McKinney 1972).

Plaintiff is now over 58 years old and is the sole supporter of her family. She is licensed to practice chiropractic in Maine and New Hampshire and has passed an examination given by the National Board of Chiropractors. On September 21, 1971, plaintiff applied to defendant Board of Regents for waiver of the examination requirement pursuant to New York Education Law § 6506(5) (McKinney 1972). Under § 6506(5) the Board of Regents, in their discretion, can waive education, experience, and examination requirements if it is satisfied that the requirements for a professional license have been "substantially met." After such a waiver, the New York State Education Department would be authorized to issue a license.

By letter dated November 22, 1971, plaintiff was informed that the Board of Regents had voted on November 19, 1971, to deny her application for waiver of the examination requirement. Thereafter, by petition verified on December 10, 1971, and order to show cause signed January 26, 1972, plaintiff commenced an Article 78 proceeding attacking the decision of the Board of Regents as arbitrary and capricious and seeking an order directing the New York State Education Department and the Board of Regents to issue her a license to practice chiropractic in the State of New York.

Plaintiff's petition was granted at Special Term of the Supreme Court of the State of New York, but that order was reversed by the Appellate Division, Third Department. On November 20, 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that as a matter of law the Board of Regents had not abused their discretion in denying plaintiff's application. Tomanio v. Board of Regents, 38 N.Y.2d 724 (1975), aff'g mem. 43 App. Div. 2d 643 (3d Dep't 1973)(mem.). See Generally Marburg v. Cole, 286 N.Y. 202 (1941).

Then, on June 25, 1976, plaintiff commenced the present action in this Court premised on violation of the due process clause of the Fourteenth Amendment. Thereafter, and now pending in the County Court of Dutchess County, a criminal action was initiated against plaintiff charging her with the unauthorized practice of chiropractic. See N.Y. Education Law § 6512 (McKinney Supp. 1977).

DISCUSSION

A

As previously noted, defendants move for summary judgment and dismissal of plaintiff's complaint on the ground of res judicata. This portion of defendants' motion is based on the prior Article 78 proceeding brought by plaintiff in the state courts. The Court of Appeals Second Circuit, however, has held that a prior state court proceeding will not bar a federal court in a civil rights action from considering matters that were not actually litigated and determined in the prior proceeding. See, e.g., Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

The record on appeal and briefs submitted to the New York State Court of Appeals clearly establish that plaintiff did not raise a due process claim before the courts of the State of New York. Therefore, principles of res judicata do not bar plaintiff's present action under the Civil Rights Act alleging deprivation of her constitutional right to due process of law. This same reasoning should apply to plaintiff's assertion of a claim brought directly under the Fourteenth Amendment with jurisdiction predicated on 28 U.S.C. § 1331.

B

Defendants also challenge plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted. Defendants contend that no hearing is required before the Board of Regents when it is asked to waive a specific licensing requirement by an individual who, prior to the advent of licensing in the State of New York, had

previously been permitted to practice chiropractic in this state.

Due process is a flexible concept, the contours of which are shaped by the circumstances of each particular situation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Turning to the particular situation that is before this Court, it is evident that plaintiff has a constitutional right to practice her profession free from unreasonable governmental interference. Green v. McElroy, 360 U.S. 474, 492 (1959). While this is true, however, the imposition of a new requirement for the continued practice of that calling, in and of itself, does not offend the Constitution. Gray v. Connecticut, 159 U.S. 74 (1895); Wasmuth v. Allen, 14 N.Y. 2d 391, appeal dismissed, 379 U.S. 11 (1964)(per curiam). See also Bell v. Burson, 402 U.S. 535, 539 (1971).

In my judgment, the practice of chiropractic in this state, prior to the licensing scheme enacted in 1963, is a "property" interest and "liberty" interest that cannot be taken away by the state except in accordance with principles of due process as embodied in the Fourteenth Amendment. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Huntley v. Community School Board, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977); Hecht v. Monaghan, 307 N.Y. 461 (1954). Furthermore, in determining whether to waive the examination requirements in plaintiff's behalf, the Board of Regents was called upon to ascertain "the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined." Hecht v. Monaghan, supra, 307 N.Y. at 469.

Under these circumstances, it is my opinion that before the Board of Regents decided to deny plaintiff's application for waiver of the examination requirement and licensure, a determination that is predominantly adjudicative, a hearing should have been held. See generally Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609, 637 (1973)(Powell, J., concurring). In my judgment, it is not significant under the facts of this case that pursuant to New York's statutory scheme the Board of Regents is given the authority to deny or grant a waiver of statutory licensing requirements rather than authority to withdraw or sustain the grant of a state license. The last action taken by the state with regard to plaintiff's ability to practice chiropractic in New York was contained in a letter from the Board of Regents dated November 22, 1971. By that letter, which denied plaintiff's application for waiver of examination requirements and licensure to practice chiropractic the Board of Regents terminated a "property" interest and "liberty" interest protected by the Fourteenth Amendment -- plaintiff's right to continue to practice her chosen profession.

It is not this Court's role to substitute its judgment for that of the Board of Regents in this matter. Yet, as the New York State Court of Appeals has stated, "it is no answer to say that in [t]his particular case due process of law would have led to the same result." Hecht v. Monaghan, supra, 307 N.Y. at 470. Although it does not appear that plaintiff requested a hearing or that a hearing is contemplated by statute, some form of hearing should have been held under

the circumstances of this case. Id. at 468. This decision, however, should not be misunderstood to require some form of hearing in every situation where an individual seeks a waiver of licensing requirements. For instance, a person who was not practicing chiropractic in New York prior to 1963 presents a totally different situation than that which is before this Court. In addition, it should be noted that there is no indication in the record that the burden to be borne by the state in providing some form of hearing to applicants such as the plaintiff would be of insurmountable magnitude. See Mathews v. Eldridge, supra, 424 U.S. at 335.

Furthermore, I believe that if, after a hearing as discussed above, a person is denied the right to continue in the practice of his or her chosen calling, then that person is entitled to a formal written statement of reasons articulated by the Board of Regents setting forth the basis for that determination. See Hornsby v. Allen, 326 F.2d 605, on rehearing, 330 F.2d 55 (per curiam) (5th Cir. 1964); Davis v. Clyne, 56 App. Div. 2d 692 (3d Dep't 1977)(mem.). See also Davis v. Clyne, 58 App. Div. 2d 947 (3d Dep't 1977) (mem.), leave to appeal denied, 44 N.Y.2d 646 (1978).

Therefore, in my judgment, this portion of defendants' motion is without merit and must be denied. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

Defendants' motion for summary judgment also sets forth the ground of statute of limitations. A statute of limitations reflects legislative wisdom in selecting a period within which to commence an action that balances the interests of preserving meritorious claims, discouraging frivolous claims, and preventing the prejudice and surprise attendant to the revival of stale claims. Federal law does not provide a specific statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 or directly under the Fourteenth Amendment. Under such circumstances the applicable period of limitations will usually be taken from the most analogous statute of limitations provided for by state law. E.g., Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975); Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963).

It has long been held that New York's three-year time period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N.Y. C.P.L.R. § 214(2) (McKinney Supp. 1977), governs civil rights actions brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343. E.G., Meyer v. Frank, 550 F.2d 726 (2d Cir.), cert. denied, 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Assuming arguendo that plaintiff has stated a claim directly under the Fourteenth Amendment with jurisdiction grounded in 28 U.S.C. § 1331, see Turpin v. Mailet, Slip Op. 3243 (2d Cir. June 5, 1978) (en banc), I would apply the same statute of limitations that governs

plaintiff's claim brought under the Civil Rights Act. See id. at 3271; Cestaro v. Mackell, 429 F. Supp. 465 (E.D.N.Y. 1977).

Furthermore, the Court of Appeals, Second Circuit, has applied the same statute of limitations to equitable as well as legal remedies sought under the Civil Rights Act. Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977). But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, New York's three-year statute of limitations found in N.Y. C.P.L.R. § 214(2) governs plaintiff's claim asserted in this lawsuit. As is evident from the pleadings, plaintiff's claim arose in November 1971 when her application for waiver of the examination requirement and licensure was denied by the Board of Regents. See Ornstein v. Regan, supra, 574 F.2d at 119. Although it may appear that plaintiff's claim is time-barred, this does not end a court's inquiry into the timeliness of a claim.

Notwithstanding the passage of time since the conduct that plaintiff complains of, her action may still be timely and her claim saved if circumstances exist that would have tolled the running of the statute of limitations. In Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970), the Court of Appeals, Fifth Circuit, posited that the statute of limitations applicable to a civil rights action is tolled during the pendency of administrative and judicial proceedings aimed at vindicating a plaintiff's state-created rights. As of yet, however, the Court of Appeals, Second Circuit, has failed to address itself to this issue.

E.g., Williams v. Walsh, supra, 558 F.2d at 673 n.5; Meyer v. Frank, supra, 550 F.2d at 729 n.8. But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situation. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (Burger, C.J., dissenting); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

Although a toll of the statute of limitations in civil rights actions should not be routinely recognized, see, e.g., Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 454; Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978)(per curiam); Meyer v. Frank, supra, 550 F.2d at 726, I believe that under the facts of this case a toll is justified and would be in accordance with federal policy considerations under the Civil Rights Act.

Plaintiff's Article 78 proceeding was brought in state court almost immediately after the decision by the Board of Regents to deny her application. That proceeding was premised entirely on state-created rights and in pursuit of state-created remedies. It was not until November 20, 1975, that plaintiff's petition was dismissed by the New York State Court of Appeals. Thereafter, on June 25, 1976, plaintiff commenced the present action for vindication of her federally secured rights.

In my judgment, it cannot be said that plaintiff has slept on her rights. See Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 466.

Therefore, this Court holds, under the reasoning expounded in Mizell v. North Broward Hospital District, supra, that plaintiff's claim of deprivation of federally protected rights is not time-barred; the period of limitation having been tolled during the pendency of plaintiff's Article 78 proceeding in the state courts. Thus, this portion of defendants' motion for summary judgment must be denied.

D

Having canvassed all of the pleadings in this lawsuit, it is my opinion that defendants have not raised a viable defense to this action. See Answer, filed July 23, 1976; Roth v. Board of Regents, 310 F. Supp. 972, 974-75 (W.D. Wis. 1970), aff'd, 446 F. 2d 806 (7th Cir. 1971), rev'd on other grounds, 408 U.S. 564 (1972). Furthermore, inasmuch as there is no genuine dispute as to any material fact between the parties and because a motion for summary judgment searches the record, it is clear to my mind that plaintiff is entitled to judgment on her claim brought pursuant to the Civil Rights Act as a matter of law for the reasons set forth in Part B above. See 6 J. Moore, Federal Practice ¶ 56.12 (2d ed. 1977); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973).

Therefore, due to the fact that the Court has reached a final determination of plaintiff's claim on the merits, plaintiff's motion for a preliminary injunction is now moot. The only issue remaining is that of appropriate relief.

By her complaint, plaintiff seeks declaratory and injunctive relief as well as such other relief as this Court may deem proper. More specifically, plaintiff seeks a declaration, under the Federal Declaratory Judgments Act, U.S.C. §§ 2201-2202, that plaintiff's constitutional right to due process was violated by the Board of Regents' denial of her application for waiver of the examination requirement; an order directing the Board of Regents to grant her application for waiver of the examination requirement; and a preliminary injunction permitting plaintiff to practice her chosen profession pending trial and final judgment on the merits of her claim.

Plaintiff's request for a preliminary injunction is now moot. In addition, I believe it would be improper for me in fashioning relief to order the Board of Regents to grant plaintiff's application for a waiver of the examination requirement or to order the New York State Education Department to issue her a chiropractic license. See Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Such relief could not be justified and would not be a proper remedy for vindication of the constitutional rights violated under the circumstances presented herein. See, e.g. Hornsby v. Allen, supra, 330 F.2d at 56.

Therefore, under the circumstances presented, the only relief that plaintiff seeks and to which she is entitled is a declaration that her constitutional right to due process of law under the Fourteenth Amendment was violated by the absence of some form of hearing prior to the Board of Regents' denial of her application for waiver of the examination requirement.

CONCLUSION

Accordingly, it is hereby declared and adjudged that under the due process clause of the Fourteenth Amendment plaintiff's federally secured rights were violated by defendant Board of Regents' decision not to waive the chiropractic examination requirement in plaintiff's behalf, which determination was made without affording the plaintiff some form of hearing and which was made without a formal written statement of reasons indicating why she was not granted such a waiver. All other relief requested by the plaintiff is hereby denied.

Consequently, defendants' motion for summary judgment is denied in its entirety and plaintiff's motion for a preliminary injunction is denied and dismissed as moot in light of the rulings of the Court herein.

The Clerk is hereby directed to enter a final and declarative judgment in favor of plaintiff Mary Tomanio on her claim brought under the Civil Rights Act in accordance with this memorandum-decision.

It is so Ordered.

Dated: August 25, 1978
Albany, New York

s/James T. Foley
United States District Judge

In the Matter of MARY TOMANIO, Appellant, v BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK et al., Respondents.

Argued October 21, 1975; decided November 20, 1975

Physicians and surgeons — license to practice chiropractic — petitioner, who had been practicing chiropractic in New York since 1958, had taken licensing examination on seven different occasions subsequent to enactment of chiropractic licensing law, had passed all subjects except chemistry, and had average of 74.4 in group of subjects containing chemistry, while passing mark therein was average of 75, applied to Board of Regents for licensure pursuant to section 6506 (subd [5]) of Education Law, providing that board might waive prescribed education, experience and examination requirements if it was satisfied said requirements had been substantially met — in article 78 proceeding, contention by her that board acted arbitrarily and capriciously when it denied her application — order of Appellate Division which dismissed her petition affirmed — board's refusal to waive examination required by statute was not, as matter of law, abuse of discretion.

Matter of Tomanio v Board of Regents of Univ. of State of N. Y., 43 AD2d 643, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 30, 1973, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (DE FOREST C. PITT, J.), entered in Albany County in a proceeding pursuant to CPLR article 78, granting a petition for a judgment directing the issuance to petitioner of license to practice

chiropractic in New York State, and (2) dismissed the petition. Under the Regulations of the Commissioner of Education, the passing mark for each subject of the chiropractic licensing examination was 75, except that the passing mark in all subjects of any one group of subjects was an average of 75, provided that, in determining the average, no grade less than 65 and only one grade less than 75 was accepted (8 NYCRR 73.3). Under section 6506 (subd [5]) of the Education Law, the Board of Regents might "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided [it] shall be satisfied that the requirements of such article have been substantially met". Petitioner had been practicing chiropractic in New York since 1958, had taken the licensing examination on seven different occasions subsequent to the enactment of the chiropractic licensing law (L 1963, ch 780), had passed all subjects except chemistry, in which she received a mark of 67, and had an average of 74.4 in the group of subjects containing chemistry. She applied to the board for licensure pursuant to section 6506 (subd [5]) of the Education Law, alleging as reasons why it should exercise its statutory power, that she had failed by a narrow margin; that her failure was caused by failing a science not utilized in chiropractic, and that she had qualified for practice in two other States, had passed an examination given by the National Board of Chiropractic Examiners, and had 13 years of practice in New York. In her present proceeding she contended that the board acted arbitrarily and capriciously when it denied her application.

Vincent J. Mutari for appellant.

Donald O. Meserve and *Robert D. Stone* for respondents.

Order affirmed, without costs. The refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion. (Education Law, § 6506, subd [5]; § 6554, subd [4]; see, also, *Matter of Levi v Regents of Univ. of State of N. Y.*, 256 App Div 444, affd 281 NY 627.)

Concur: Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG. Taking no part: Judge COOKE.

APPENDIX D

DECISION OF THE APPELLATE
DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK,
THIRD DEPARTMENT

In the Matter of Mary Tomanio, Respondent, v. Board of Regents of the University of the State of New York et al., Appellants. - Appeal from a judgment of the Supreme Court, Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, seeking to direct the Board of Regents to issue her a license to practice chiropractic in New York State. The petitioner has been practicing chiropractic in this State since 1958. In 1963, by chapter 780 of the Laws of 1963, this State adopted its first chiropractic licensing law and section 6556 of the Education Law became applicable to those who, like the petitioner, were then practicing in the State. In 1971, acting upon the recommendation of the Joint Legislative Committee to revise and simplify the Education Law, the Legislature amended and recodified the then existing law by enacting chapter 987 of the Laws of 1971. Sections 6554 and 6506 of the Education Law are the pertinent sections here. It is important to note that there is no claim here that the amendments in any way diminished or impaired the "grandfather" provisions or any other rights acquired by the petitioner under the original act. Since 1963, the petitioner has continued

her practice and has taken the examination for admittance as required by section 6554 of the Education Law on seven different occasions and has failed to achieve the necessary grade on each opportunity. She does not question the make-up of the examination, nor does she take issue with the grading thereof. Petitioner does contend that her final grade, as computed under 8 NYCRR 73.3, is such that when coupled with her experience, constitutes substantial compliance and that, therefore, the board abused its discretion by not waiving the examination result as she asserts they could and should do under subdivision (5) of section 6506 of the Education Law. As an alternative to receiving a passing grade of 75 in each subject in order to pass the examination, the regulations (8 NYCRR, 73.3) provide in substance that any candidate who passes all required subjects but one, may average the highest grades attained in each subject (passed) with the highest grade obtained in the failed subject and if the average is 75 or more, the candidate shall be deemed to have passed the examination. Using this procedure, petitioner's grade is 74.4. Subdivision (5) of section 6506 of the Education Law provides as follows: "In supervising, the board of regents may: * * * (5) Waive education, experience and examination requirements for a professional license prescribed in this article relating to the profession, provided the board of regents shall be satisfied that the requirements of such

article have been substantially met". It should be remembered that in an article 78 proceeding the court may not substitute its own judgment for that of the board and may inquire only as to whether the record shows facts which leave no possible scope for the reasonable exercise of discretion (Matter of Mid-Is. Hosp. v. Wyman, 25 AD 2d 765, 767). There must be a clear showing that petitioner has established a distinct right to the relief sought (Matter of Stracquadanio v. Department of Health, 285 N.Y. 93). Subdivision (5) of section 6506 of the Education Law is permissive, not mandatory. In its delegation of responsibility in the licensing area, the Legislature sought to provide the Regents with the means of minimizing hardship while at the same time providing overall protection for the public by establishing minimum standards of competence. A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any dqubt that their action was arbitrary or capricious. Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examinations and barely failed. The petitioner has failed to meet her burden and the board's action was thoroughly justified. Judgment reversed, on the law and the facts, and petition

dismissed, without costs. Staley, Jr., J.P., Greenblott, Cooke, Main and Reynolds, JJ., concur.

APPENDIX E

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT, SECTION 1

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED
IN THIS CASE

APPENDIX F

FORMER EDUCATION LAW PROVISIONS PROVIDING SPECIAL EXAMINATIONS FOR "GRANDFATHER" CHIROPRACTORS.

Section 6556. Present practitioners

1. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who:

a. is twenty-one years of age or over;

b. is a citizen of the United States or who has duly declared his intention of becoming a citizen in accordance with law;

c. is a graduate of a resident course in chiropractic, consisting of not less than two school years of formal study;

d. is of good moral character;

e. is a resident of this state and has been a resident for at least one year prior to July first, nineteen hundred sixty-three;

f. has engaged for the period of at least the fifteen years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

g. passes an examination prepared by the board in the practice of chiropractic and an examination in the use and effect of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

* * * *

3. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who at the time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section and who:

a. has been engaged for the period of at least the two years, and not more than the seven years, immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state;

b. passes an examination prepared by the department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and

c. in addition to such written examination, passes a written examination prepared by the board in the use and effects of X-ray and a practical examination prepared by the board in chiropractic.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use

X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

NEW YORK EDUCATION LAW SECTION 6551 SUBDIVISION 1 DEFINING CHIROPRACTIC

Section 6551, subdivision 1:

The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortions, misalignment or subluxation of or in the vertebral column.

NEW YORK EDUCATION LAW SECTION 6506
AUTHORIZING THE BOARD OF REGENTS TO
WAIVE SPECIFIC LICENSING REQUIREMENTS
IN ANY PROFESSION OR TO INDORSE LICENSES
OF OTHER JURISDICTIONS

Section 6506. Supervision by the board of regents

The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:

* * * *

(5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

(6) Indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the following requirements:

(a) Application: file an application with the department;

(b) Education: meet educational requirements in accordance with the commissioner's regulations;

(c) Experience: have experience satisfactory to the board in accordance with the commissioner's regulations;

(d) Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: be at least twenty-one years of age;

(f) Citizenship: be a United States citizen, or file a declaration of intention to become a citizen, unless such requirement is waived, in accordance with the commissioner's regulations;

(g) Character: be of good moral character as determined by the department; and

(h) Fees: pay a fee to the department for indorsement of forty dollars.

APPENDIX G

TOMANIO, MARY E. RECORD OF CHIROPRACTIC EXAMINATIONS

A. EXAMINATIONS UNDER FORMER EDUCATION LAW SECTION 6556.

DATE	BACT.	HYG.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
4/64	(28)	(58)	(36)	(61)	(40)	(46)	(57)	(62)	(48)
12/64	(36)	(59)	(48)	(63)	(52)	(49)	(54)	(54)	(49)
66-67	(35)	(56)	(30)	(56)	(57)	(34)	(34)	(60)	(43)
6/67	(43)	(63)	(41)	77	(70)	(59)	(49)	(52)	(43)
12/67	(49)	(63)	(52)		(65)	(56)	(59)	76	(63)
5/71	75		(67)		78	77	75		(64)

B. EXAMINATION UNDER EDUCATION LAW SECTION 6554.

DATE	MICRO.	ANAL.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
1/72	(62)	(52)	(41)	75	75	(71)	75	75	(55)

FEDERAL CIVIL RIGHTS STATUTE

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.